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### Choice of Law in Fraudulent Joinder Litigation

Walter Simons

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## COMMENT

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### CHOICE OF LAW IN FRAUDULENT JOINDER LITIGATION

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WALTER SIMONS<sup>†</sup>

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<sup>†</sup> Executive Editor, Volume 163, *University of Pennsylvania Law Review*. J.D. Candidate, 2015, University of Pennsylvania Law School; B.A., 2011, Rice University. I am grateful to Professor Tobias Wolff for his guidance on this project. This Comment has benefited greatly from the hard work of my friends on the *Law Review*. I am especially thankful to Kelly Tomlin, Brian Springer, and the other Executive Editors.

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## INTRODUCTION

The grant of subject matter jurisdiction to federal courts based on diversity of citizenship has, for centuries, required complete diversity between parties to the litigation.<sup>1</sup> If a case is brought in state court and complete diversity exists between the parties, the defendant has the statutory right to remove the case to federal court.<sup>2</sup> Absent another basis for federal jurisdiction, the lack of complete diversity strips the federal court of subject matter jurisdiction, and the court is required to remand the case to state court.<sup>3</sup> Therefore, the presence of a single nondiverse defendant is sufficient to defeat diversity jurisdiction.

The doctrine of fraudulent joinder has arisen in response to plaintiffs' efforts to take advantage of this complete diversity requirement and thereby control whether a state or federal court hears their case. Fraudulent joinder refers to a plaintiff's attempt to defeat complete diversity and generally occurs in one of two ways: (1) a plaintiff commits actual fraud by inaccurately pleading the citizenship of the parties to the lawsuit or (2) a plaintiff sues a nondiverse defendant against whom the plaintiff cannot establish a cause of

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<sup>1</sup> See 28 U.S.C. § 1332 (2012) (granting original jurisdiction to district courts over cases between citizens of different states where the amount in controversy exceeds \$75,000); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (imposing the complete diversity requirement).

<sup>2</sup> See 28 U.S.C. § 1441(a) (2012) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . .").

<sup>3</sup> See 28 U.S.C. § 1447(c) (2012) (mandating remand if the federal court lacks subject matter jurisdiction at any point in the litigation).

action.<sup>4</sup> This Comment focuses only on the second method, which is litigated with much greater frequency than the first.<sup>5</sup> In this context, the diverse defendant will generally remove the case to federal court and argue that the judge should ignore the citizenship of the nondiverse co-defendant because the plaintiff has no chance of stating a claim against that defendant.<sup>6</sup>

If the federal court determines that the plaintiff has no cause of action against the nondiverse defendant, the court is permitted to ignore that defendant's citizenship and thereby establish complete diversity.<sup>7</sup> However, if the court determines that the nondiverse defendant is properly joined, then complete diversity is absent and the case must be remanded to state court. The result of a fraudulent joinder dispute therefore determines whether a suit will be heard in state or federal court—an important consideration for litigants.<sup>8</sup>

To resolve the fraudulent joinder question, the federal judge must look to a source of law to determine whether the plaintiff has established a cause of action against the nondiverse defendant. In many cases, all parties agree on which law applies to the case; in those circumstances, the judge will conduct the fraudulent joinder inquiry using the agreed-upon legal standards. In some cases, however, the events giving rise to the litigation have connections to multiple jurisdictions and therefore multiple laws could potentially apply. In these cases, the judge must decide which state's law to use to determine whether the plaintiff has stated a claim against the nondiverse defendant.

In such a case, it is not clear how a judge should approach this choice of law determination or whether the judge is even permitted to make a choice of law determination at all. On the one hand, if the nondiverse defendant is properly joined, the federal court does not have subject matter jurisdiction and arguably cannot make a choice of law determination. On the other hand, there may be cases in which the plaintiff can state a claim against the nondiverse defendant under one state's substantive standard, but not under

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<sup>4</sup> *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003).

<sup>5</sup> James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1019-20 (2006). Note that the term "fraudulent joinder" is also sometimes used to refer to an inappropriately joined co-plaintiff or to the joinder of a claim that is procedurally flawed, rather than flawed on the merits. *Id.* at 1020 n.32. These variations are beyond the scope of this Comment.

<sup>6</sup> *Id.* at 1019-20.

<sup>7</sup> Matthew C. Monahan, Note, *De-Frauding the System: Sham Plaintiffs and the Fraudulent Joinder Doctrine*, 110 MICH. L. REV. 1341, 1349 (2012).

<sup>8</sup> See Underwood, *supra* note 5, at 1013-14 (noting that whether a case is tried before a state or federal judge has a significant impact on the results of the adjudication of claims).

another state's standard. In these cases, the court cannot resolve the fraudulent joinder dispute without making a choice of law determination.

This Comment takes the position that a court must perform a choice of law analysis as part of its fraudulent joinder inquiry. This determination is necessary to decide whether a law could apply to the case that would sustain the action against the nondiverse defendant. Further, the court should give the same deference to the plaintiff's choice of law as it gives to the plaintiff's choice of forum under the jurisdiction's fraudulent joinder standard. This conclusion draws upon the idea that choice of law is fundamentally a merits-based inquiry and that a decision on the merits requires reference to an applicable law. Therefore, a court cannot properly make a determination about whether the suit against the nondiverse defendant has merit, or is merely "fraudulent," without selecting and applying an appropriate law.

Part I of this Comment discusses the legal standards and principles behind diversity jurisdiction, fraudulent joinder, and choice of law. Part II discusses the inconsistent approaches that courts have taken to choice of law in the fraudulent joinder context. Finally, Part III argues that a choice of law determination is necessary in a fraudulent joinder case because a federal court cannot determine whether a plaintiff has a colorable claim against the nondiverse defendant without reference to a colorable law. This Comment contends that the choice of law determination should be made with reference to the particular jurisdiction's fraudulent joinder standard.

## I. LEGAL PRINCIPLES APPLICABLE TO CHOICE OF LAW IN FRAUDULENT JOINDER LITIGATION

This Part reviews the key legal standards that are relevant to choice of law issues in fraudulent joinder litigation. Section A discusses the legal authority for diversity jurisdiction and the justifications for federal courts to hear diversity cases. Section B discusses the different standards courts use to decide whether a party has been "fraudulently joined" to the litigation. Section C reviews the most common choice of law approaches that courts use to determine which state's law applies to a case.

### A. *Diversity Jurisdiction and Its Justifications*

The concept of jurisdiction based on diversity of citizenship appears in the Constitution, which provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity . . . between Citizens of different States."<sup>9</sup> The

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<sup>9</sup> U.S. CONST. art. III, § 2.

power of federal district courts to hear diversity cases is statutory. Section 1332 of the U.S. Code provides that district courts “shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000” and where the lawsuit is between “citizens of different States.”<sup>10</sup> The diversity requirement of section 1332 has long been understood to require complete diversity of citizenship,<sup>11</sup> meaning that each plaintiff must be diverse from each defendant. By contrast, the Constitution requires only minimal diversity,<sup>12</sup> which provides for federal jurisdiction as long as any one plaintiff is diverse from any one defendant.

The original justification for diversity jurisdiction is a matter of some debate. Many commentators argued that diversity jurisdiction was necessary to provide “a forum where parochial state laws would not be enforced”; instead, the federal courts would apply a “general federal law” to those cases.<sup>13</sup> But as Professor Percy points out, this rationale cannot support the existence of diversity jurisdiction today in light of the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins*.<sup>14</sup> At the time of the Constitutional Convention, only a small number of delegates suggested that diversity jurisdiction was designed to protect out-of-state citizens from local prejudice.<sup>15</sup>

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<sup>10</sup> 28 U.S.C. § 1332(a)(1) (2012).

<sup>11</sup> See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (“If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States, in order to support the jurisdiction.”).

<sup>12</sup> See C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 633 (2004) (“Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.” (quoting *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) (internal quotation marks omitted))). Since the requirement of complete diversity is not a constitutional requirement, Congress has the power to authorize suits based on minimal diversity. See Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779, 785 (2006) (noting that Congress approved class actions in federal court based on minimal diversity in 2005).

<sup>13</sup> E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 197 (2005).

<sup>14</sup> *Id.* at 198; see *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.”).

<sup>15</sup> See Percy, *supra* note 13, at 198. Although Professor Percy doubts the actual significance that the concept of prejudice had in early debates around diversity jurisdiction, he notes that many courts cite to Chief Justice Marshall’s opinion in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), as support for the proposition that diversity jurisdiction was intended to combat prejudice against out-of-state parties. Percy, *supra* note 13, at 199; see, e.g., *O’Brien v. AVCO Corp.*, 425 F.2d 1030, 1033 (2d Cir. 1969) (explaining that the danger of prejudice was the “historical rationale” for diversity jurisdiction and remains its “chief underlying support” (citing *Deveaux*, 9 U.S. (5 Cranch) at 87)).

Today, although there is some dispute over whether such prejudice exists,<sup>16</sup> the fear of local prejudice is a commonly cited justification for the existence of diversity jurisdiction.<sup>17</sup>

Diversity jurisdiction is undoubtedly a powerful tool that has a very real effect on litigation. If diversity exists, a defendant may remove a case initially filed in state court to federal court.<sup>18</sup> On the other hand, if the plaintiff can show at any point during the litigation that complete diversity does not exist, then the district court must remand the case to state court.<sup>19</sup>

Whether a suit will be heard in federal or state court is often extremely important to litigants. In many cases, ensuring that the most desirable forum hears the case is “the most important strategic decision a party makes in a lawsuit.”<sup>20</sup> Because state courts are generally considered more favorable toward plaintiffs, many plaintiffs file in state court and fight removal to federal court; by contrast, defendants have a strong incentive to remove the case.<sup>21</sup> This practice indicates that the concerns about bias toward in-state parties are likely justified.<sup>22</sup> In fact, studies have shown that the result of the dispute over removal to federal court has a strong predictive effect on the

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<sup>16</sup> See Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 54 n.26 (2009) (collecting authorities that have argued both for and against the idea that local bias is no longer sufficient to sustain diversity jurisdiction).

<sup>17</sup> See, e.g., *Díaz-Rodríguez v. Pep Boys Corp.*, 410 F.3d 56, 61 (1st Cir. 2005) (“A primary purpose of diversity jurisdiction is to shield foreign parties from the prejudice they might face as outsiders in state court.”); *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148, 1152 n.3 (5th Cir. 1985) (“The original central justification for diversity jurisdiction was grounded in the fear of prejudice against outsiders from other states, or in other words, the lack of confidence in the adequacy of state court justice.”).

<sup>18</sup> 28 U.S.C. § 1441(a) (2012) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”).

<sup>19</sup> *Id.* § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”).

<sup>20</sup> Rosenthal, *supra* note 16, at 55-58 (explaining that forum selection can have an impact on geographic location, the substantive and procedural laws applied in the case, and the value of a case at settlement).

<sup>21</sup> See Percy, *supra* note 13, at 205-06 & n.110 (explaining that generally plaintiffs prefer to litigate in state court and defendants prefer to litigate in federal court for a variety of reasons, including differences in procedural rules and the general perception among litigants that state court judges are more favorable to plaintiffs and federal judges are more favorable to defendants); see also Heather R. Barber, *Removal and Remand*, 37 LOY. L.A. L. REV. 1555, 1558 (2004) (noting that federal courts are believed to be more defendant-friendly).

<sup>22</sup> See Rosenthal, *supra* note 16, at 57 (“In reality, a case does not receive the same treatment or have the same chance of success in federal court as it does in state court, especially when local plaintiffs sue large, out-of-state corporations.” (footnote omitted)).

outcome of the litigation.<sup>23</sup> Putting concerns of bias aside, the federal forum provides a number of procedural advantages for defendants, “includ[ing] the increased availability of summary judgment, the possibility of separating the trial into liability and damages phases, the increased role of the federal judge in the scheduling process, and federal evidentiary laws that may be more favorable to defendants.”<sup>24</sup> Given these distinctions between state and federal courts, the ultimate forum for a case remains critically important to both parties to the litigation.<sup>25</sup>

### B. *Development of Fraudulent Joinder Law*

Fraudulent joinder is a direct response to the relative advantages and disadvantages of litigating in state or federal court. A plaintiff’s incentive to “fraudulently join” a nondiverse defendant is fairly clear—the nondiverse defendant destroys complete diversity and allows the plaintiff to litigate in the more favorable state court forum. The development of fraudulent joinder doctrine was a response to this sort of jurisdictional gamesmanship by plaintiffs. The doctrine “permits federal courts to essentially ignore the inclusion in a lawsuit of a nondiverse party who would otherwise destroy federal diversity jurisdiction when the district court concludes that the party’s joinder is a sham.”<sup>26</sup> Although this doctrine is necessary to prevent diverse defendants from being wrongfully denied their statutory right to remove to federal court, its exact contours remain largely undefined. The fraudulent joinder doctrine was originally elaborated in a series of Supreme Court opinions but has not been addressed by the Court in many years. As a result, lower federal courts have developed a number of competing standards to determine whether a nondiverse defendant has been fraudulently joined. This Section traces the development of the fraudulent joinder doctrine through Supreme Court precedent and into the modern day.

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<sup>23</sup> See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (“[I]n diversity cases, the win rate drops from 71% in original cases to 34% in removed cases.”). Although the difference between a state and federal forum is undoubtedly impactful, Clermont and Eisenberg’s study likely overstates the effect. As the authors recognize, the strength of the cases that are removed and the quality of the lawyering in those cases may also contribute to the low win rates. *Id.* at 603-05. However, even accounting for these factors, the authors found that removal had a significant effect on outcome. *Id.*

<sup>24</sup> Monahan, *supra* note 7, at 1342 n.6 (citations omitted).

<sup>25</sup> See Percy, *supra* note 13, at 191-92 (noting that defendants have become “increasingly resistant” to litigating in state court and that the business lobby has succeeded in getting many of the largest cases, such as class actions, pushed to federal court).

<sup>26</sup> Underwood, *supra* note 5, at 1018.



### 1. The Supreme Court's Elaboration of Fraudulent Joinder

The Supreme Court has referenced the fraudulent joinder doctrine on multiple occasions but has made only limited holdings as to the contours of the doctrine. Most modern development of fraudulent joinder jurisprudence has occurred in the lower courts. Nonetheless, the Supreme Court cases provide an important framework for understanding fraudulent joinder and for evaluating the legal standards used in the lower courts today.

The Supreme Court has traditionally been resistant to defendants' attempts to alter the structure of the lawsuit as pleaded by the plaintiff. Generally, "[a] plaintiff is master of her complaint and thus is permitted to preclude removal in some circumstances."<sup>27</sup> In an early case, the Court noted that "[a] defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. . . . [I]t cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way."<sup>28</sup> The Court explained that the question of removability must be decided based on the plaintiff's pleadings at the time of removal and that a defendant's showing that liability is several could not alter the case pleaded by the plaintiff.<sup>29</sup> The Court would later explain that "the fact that the defendants might have been sued separately affords no ground for removal," again giving deference to the plaintiff's decision to pursue defendants jointly.<sup>30</sup>

However, the Court has also been conscious of attempts by litigants to manipulate jurisdiction. Where the plaintiff "attempt[s] to commit a fraud upon the jurisdiction of the Federal courts[,] the Court has stated that "the Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals."<sup>31</sup> Although the Court used the term "fraud" in this early articulation of the fraudulent joinder doctrine, the meaning of "fraud" in this context was largely unclear. Initially, the Court seemed to imply that proving fraudulent joinder required a showing of bad faith on the part of the plaintiff.<sup>32</sup> The subject of the bad faith requirement

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<sup>27</sup> Monahan, *supra* note 7, at 1347 (noting that a plaintiff may manipulate the forum that hears her lawsuit and intentionally prevent removal in certain circumstances).

<sup>28</sup> Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 214-15 (1906) (quoting Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 97 (1898)) (internal quotation marks omitted).

<sup>29</sup> *Id.* at 215-16; *see also* Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939) (holding that the court of appeals erred in considering the plaintiff's second amended complaint rather than the plaintiff's complaint at the time of the petition for removal).

<sup>30</sup> Jenkins, 305 U.S. at 538.

<sup>31</sup> Thompson, 200 U.S. at 218.

<sup>32</sup> *See id.* at 220 (declining to find a fraud on the jurisdiction of the federal courts because the defendant had not attacked the good faith of the plaintiff's pleadings).

came directly before the Court in *Wecker v. National Enameling & Stamping Co.*, where the plaintiff defended against a fraudulent joinder claim by arguing that there was no evidence of bad faith on his part.<sup>33</sup> The Court held that, even where fraud is directly at issue, knowledge could be imputed to the plaintiff where he “willfully closes his eyes to information within his reach.”<sup>34</sup> The Court found that the nondiverse defendant had been fraudulently joined in the case and offered the following explanation:

While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.<sup>35</sup>

In other words, the *Wecker* Court acknowledged that fraudulent joinder could be found if the plaintiff’s belief in the propriety of the joinder was so unfounded as to be objectively unreasonable. Although the requirements of proving fraudulent joinder have seemingly weakened to no longer demand a showing of bad faith, the Court has clearly placed the burden of proving fraudulent joinder on the removing defendant.<sup>36</sup> Therefore, the fraudulent joinder inquiry begins with the assumption that the plaintiff’s joinder of the nondiverse defendant is legitimate.<sup>37</sup>

The Court has drawn a distinction between a defendant’s claim of fraudulent joinder and a claim that the plaintiff’s entire case is meritless. In *Chesapeake & Ohio Railway Co. v. Cockrell*, an estate administrator brought suit in state court against a diverse railway company and its nondiverse employees after a train struck and killed the decedent.<sup>38</sup> The railway argued that its employees were not negligent and therefore had been fraudulently joined.<sup>39</sup> The Court explained that the liability of the railway company

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<sup>33</sup> 204 U.S. 176, 185 (1907).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 185-86.

<sup>36</sup> See, e.g., *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939) (remanding the case upon finding that the removing defendant did not satisfy this burden).

<sup>37</sup> The burden placed on the removing party is significant and is often described as a “heavy burden.” See, e.g., *Balberdi v. Lewis*, No. 12-00582, 2013 WL 1296286, at \*2 (D. Haw. Mar. 8, 2013) (“A defendant asserting fraudulent joinder bears the heavy burden of facing both the strong presumption against removal jurisdiction as well as the general presumption against fraudulent joinder.”), *adopted by* 2013 WL 1291780 (D. Haw. Mar. 27, 2013).

<sup>38</sup> 232 U.S. 146, 149-50 (1914).

<sup>39</sup> *Id.* at 150-51.

depended on the liability of its two employees; therefore, the railway's claim that its employees were not negligent was no different than saying that the plaintiff's case was "ill founded as to all the defendants."<sup>40</sup> The Court explained that this argument went to the merits of the entire action, not to the joinder of the individual defendants; therefore, a finding of fraudulent joinder was improper.<sup>41</sup> This holding has been interpreted by some courts as articulating a "common defense rule": a defendant cannot prove fraudulent joinder of individual defendants by raising a "common defense" intended to negate the case against all defendants. The use of a "common defense" may indicate that the case as a whole has no merit, but it does not prove that a particular defendant was fraudulently joined to the case.<sup>42</sup>

## 2. The Lower Courts and Modern Fraudulent Joinder Standards

Because the Supreme Court has not fully addressed the doctrine of fraudulent joinder for many years, much of its development has taken place in the lower courts. The frequency of fraudulent joinder litigation has increased significantly since the Supreme Court's most recent decision in *Pullman Co. v. Jenkins* in 1939.<sup>43</sup> The issue of fraudulent joinder is especially relevant to modern tort litigation. Suits against diverse drug manufacturers are joined with suits against nondiverse pharmacists, suits against diverse product manufacturers are joined with suits against nondiverse retailers, and suits against diverse insurance companies are joined with suits against nondiverse insurance agents.<sup>44</sup> The standard applied to the fraudulent joinder inquiry in a given jurisdiction is important, as some jurisdictions allow a more searching inquiry into the merits of the case than others. As Professor Percy points out, fraudulent joinder litigation is uniquely problematic because, while fraudulent joinder is a jurisdictional issue, it also

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<sup>40</sup> *Id.* at 153.

<sup>41</sup> *Id.* at 153-54.

<sup>42</sup> See, e.g., *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 575 (5th Cir. 2004) ("When the only proffered justification for improper joinder is that there is no reasonable basis for predicting recovery against the in-state defendant, and that showing is equally dispositive of all defendants rather than to the in-state defendants alone, the requisite showing has not been made."); *In re New Eng. Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d 288, 300 (D. Mass. 2004) ("[F]raudulent joinder does not exist when an argument offered to prove the fraudulent joinder of non-diverse defendants simultaneously shows that no case exists against the diverse defendant or defendants. In those circumstances, no legitimate reason exists to label the non-diverse defendants as fraudulently joined.").

<sup>43</sup> See Percy, *supra* note 13, at 192 (noting that fraudulent joinder litigation has "increased dramatically" and is "becoming a prominent and time-consuming aspect of complex tort litigation").

<sup>44</sup> *Id.* at 192-93.

requires courts to evaluate the merits of the complaint against the non-diverse defendant.<sup>45</sup> “The inescapable tension between protecting diverse defendants’ right to remove and ensuring that district courts do not exceed their statutory jurisdiction” has created a collection of competing legal standards among the lower courts in the fraudulent joinder context.<sup>46</sup> Commentators debate how many fraudulent joinder standards actually exist and recognize subtle variations among courts within each “standard.”<sup>47</sup> There appear to be at least three distinct standards.

a. *No Reasonable Basis Standard*

Under the first standard, the removing defendant must show that the plaintiff has “no reasonable basis” for her claim against the nondiverse defendant. The Eighth Circuit, in *Filla v. Norfolk Southern Railway Co.*,<sup>48</sup> provides one interpretation of this standard. The court in *Filla* explained that “a proper review should give paramount consideration to the reasonableness of the basis underlying the state claim. Where applicable state precedent precludes the existence of a cause of action against a defendant, joinder is fraudulent.”<sup>49</sup> On the other hand, “if there is a ‘colorable’ cause of action—that is, if the state law *might* impose liability on the resident defendant under the facts alleged—then there is no fraudulent joinder.”<sup>50</sup>

b. *No Possibility of Recovery Standard*

Under the second standard, the removing defendant must show that the plaintiff has absolutely “no possibility of recovery” against the nondiverse defendant. Unlike the “no reasonable basis” standard, this standard focuses on the likelihood of the plaintiff’s ability to recover, rather than on the plaintiff’s ability to state a claim. The Fourth Circuit, in *Hartley v. CSX Transportation, Inc.*, stated this standard as follows: “To show fraudulent joinder, the removing party must demonstrate either ‘outright fraud in the

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<sup>45</sup> See *id.* at 193 (stating that “federal courts evaluating allegations of fraudulent joinder must walk a fine line between appropriately exercising jurisdiction to determine jurisdiction and inappropriately determining the merits of a case which lacks complete diversity”).

<sup>46</sup> *Id.*

<sup>47</sup> Compare Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119, 146–47 (2006) (noting that there are roughly two camps of standards in fraudulent joinder cases, but identifying variations within each camp), with Underwood, *supra* note 5, at 1022–23 (arguing that at least three fraudulent joinder standards have evolved and noting that it is often difficult to determine which standard a court is applying).

<sup>48</sup> 336 F.3d 806 (8th Cir. 2003).

<sup>49</sup> *Id.* at 810.

<sup>50</sup> *Id.* (footnote omitted).

plaintiff's pleading of jurisdictional facts' or that 'there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.'<sup>51</sup> The court went on to explain that "[t]he party alleging fraudulent joinder bears a heavy burden—it must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff's favor."<sup>52</sup> This "heavy burden" language is a common refrain in fraudulent joinder cases.<sup>53</sup> The court in *Hartley* also noted that the fraudulent joinder analysis is "even more favorable to the plaintiff than the standard for ruling on a motion to dismiss."<sup>54</sup>

c. *No Reasonable Possibility of Recovery Standard*

A third standard requires the defendant to show that the plaintiff has "no *reasonable* possibility of recovery" from the nondiverse defendant. In *Gray ex rel. Rudd v. Beverly Enterprises-Mississippi, Inc.*, the Fifth Circuit explained that under this standard, the removing defendant must show that there is "no *reasonable* basis for predicting that the plaintiff will recover in state court."<sup>55</sup> Although this standard uses terminology similar to the "no reasonable basis" standard, they are distinct. Unlike the "no reasonable basis" standard, this standard focuses on the possibility of recovery, not on the possibility of stating a claim. This standard is also distinct from the "no possibility of recovery" standard because it is more generous to the removing defendant: rather than having to show that the plaintiff has "absolutely no possibility" of recovering against the nondiverse defendant, the removing defendant need only show that the possibility is not reasonable.<sup>56</sup> The court in *Gray* made clear that this third standard was adopted as an intentional shift away from the "no possibility of recovery" standard and that it viewed the two standards as distinct.<sup>57</sup> Moreover, the court stated that the standard

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<sup>51</sup> 187 F.3d 422, 424 (4th Cir. 1999) (quoting *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993)).

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998) ("The defendant seeking removal bears a heavy burden of proving fraudulent joinder [sic], and all factual and legal issues must be resolved in favor of the plaintiff."); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992) ("An out-of-state defendant who wants to remove must bear a heavy burden to establish fraudulent joinder.").

<sup>54</sup> 187 F.3d at 424.

<sup>55</sup> 390 F.3d 400, 405 (5th Cir. 2004).

<sup>56</sup> *Id.*

<sup>57</sup> See *id.* ("Though our earlier fraudulent joinder cases had been uncertain as to whether a removing defendant must demonstrate an absence of *any possibility* of recovery in state court, . . . the defendant must demonstrate only that there is no *reasonable* basis for predicting that the plaintiff will recover in state court.").

was meant to be similar to the standard for a motion to dismiss,<sup>58</sup> whereas the “no possibility of recovery” standard is intended to be more favorable than the standard for a motion to dismiss.<sup>59</sup> Although there are variations in these standards among the circuit courts, in any case the burden to establish the existence of federal jurisdiction rests on the removing defendant.<sup>60</sup>

### 3. Extrinsic Evidence

When resolving a fraudulent joinder question, a court is allowed to look beyond the pleadings and engage in a more searching inquiry of the evidence than would normally be allowed at such a preliminary stage of the litigation.<sup>61</sup> All circuit courts allow district courts to look at extrinsic evidence to decide the fraudulent joinder issue.<sup>62</sup> However, courts disagree on the extent to which this evidence can be used.<sup>63</sup> Although the law allows district courts to consider extrinsic evidence, some will nonetheless confine their review to the plaintiff’s complaint at the time of removal.<sup>64</sup> Other courts will review the plaintiff’s complaint first, and then look to relevant affidavits to determine if there exist sufficient facts suggesting a possibility of recovery against the alleged fraudulently joined defendant.<sup>65</sup> Perhaps most radically, the Fifth Circuit has permitted review of factual allegations in the complaint, affidavits, and deposition transcripts as part of its fraudulent joinder determination.<sup>66</sup> Under this standard, courts are “nearly compelled” to pierce the pleadings in fraudulent joinder cases.<sup>67</sup>

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<sup>58</sup> See *id.* (noting that the standards for fraudulent joinder and for a motion to dismiss are similar “in that the crucial question is whether the plaintiff has set out a valid claim under applicable state law”).

<sup>59</sup> See *Hartley*, 187 F.3d at 424 (“[The fraudulent joinder] standard is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss . . .”).

<sup>60</sup> See *Pullman Co. v. Jenkins*, 305 U.S. 534, 540 (1939) (recognizing the defendant had to show “a separable controversy which was wholly between citizens of different States”).

<sup>61</sup> See *Monahan*, *supra* note 7, at 1350 (noting that a federal court is permitted to “pierce the pleadings to determine whether a plaintiff has a legitimate claim against the diversity-destroying defendant”).

<sup>62</sup> *Richardson*, *supra* note 47, at 148.

<sup>63</sup> *Id.*

<sup>64</sup> See, e.g., *Lynch Ford, Inc. v. Ford Motor Co.*, 934 F. Supp. 1005, 1007 (N.D. Ill. 1996) (limiting the court’s fraudulent joinder inquiry to the facts alleged in the plaintiff’s complaint).

<sup>65</sup> See, e.g., *Pampillon v. RJR Nabisco, Inc.*, 138 F.3d 459, 461-62 (2d Cir. 1998) (determining that the plaintiff’s complaint did not allege a factual basis for recovery against the nondiverse defendant and that the information in the affidavits did not cure this deficiency).

<sup>66</sup> See *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549, 551 (5th Cir. Unit A Dec. 1981) (explaining that while review of these documents is permitted, the district court should not have conducted a four-day evidentiary hearing that involved exploration of factual issues affecting the liability determination).

<sup>67</sup> *Richardson*, *supra* note 47, at 152.

The piercing of pleadings allowed in fraudulent joinder cases raises some concerns. Taken too far, this practice could result in a pretrial of merits issues before the court's subject matter jurisdiction is established.<sup>68</sup> As a result, courts have noted that this piercing must be, to some degree, "limited."<sup>69</sup> Even in the Fifth Circuit, where the *scope* of the fraudulent joinder inquiry resembles the scope on review of a summary judgment motion, courts have been careful to note that the standard *applied* to the fraudulent joinder question should be "closer to the Rule 12(b)(6) standard."<sup>70</sup>

### C. Choice of Law Approaches

In understanding the intersection of these fraudulent joinder doctrines and choice of law, it is first necessary to lay a background in choice of law principles. In general, each forum has its own "choice of law rule." A forum almost always applies its own choice of law rule.<sup>71</sup> A federal court sitting in diversity applies the choice of law rule of the state in which it sits and uses that rule to choose the appropriate law to apply to a case.<sup>72</sup> For example, a forum's choice of law rule could be to "always apply the law of the forum."<sup>73</sup> In that case, the forum would simply apply its own law to every case. Although there are many choice of law rules, the most important for the

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<sup>68</sup> See *id.* at 143-44 & 144 n.151 (warning that piercing the pleadings risks an "unconstitutional invasion of the federal district court upon the state court," but noting that a limited piercing is constitutionally permissible (internal quotation marks omitted)).

<sup>69</sup> See, e.g., *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 112 (3d Cir. 1990) (noting that some piercing of the pleadings is appropriate in fraudulent joinder cases, but holding that the district court's "summary judgment type inquiry" resembled a decision on the merits and therefore exceeded permissible bounds).

<sup>70</sup> *McKee v. Kan. City S. Ry. Co.*, 358 F.3d 329, 334 (5th Cir. 2004); see also *Richardson*, *supra* note 47, at 152 ("[P]anel of the Fifth Circuit that make use of the summary judgment language often are careful to distinguish their statement of the law regarding the scope of inquiry from the standard applied to the facts and law concerning the plaintiff's claims against the nondiverse defendant.").

<sup>71</sup> In certain situations, a court may take notice of another forum's choice of law rules. See generally Erwin N. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938) (discussing circumstances in which a state refers to another state's choice of law rule).

<sup>72</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941).

<sup>73</sup> This choice of law rule, "lex fori," is very rarely used. See Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313, 349, 384 (2013) (noting that only two jurisdictions overtly use lex fori and that it is a "parochial" approach that "openly favor[s] local law"). The use of lex fori arguably creates problems with the Full Faith and Credit clause because it universally ignores all other state's laws. See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); see also *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 821-23 (1985) (holding that a Kansas court's universal application of its own law to all parties in a class action was unconstitutional because Kansas lacked sufficient contacts to create an interest in the claims unrelated to the state).

purposes of this Comment are the “traditional” approach, the “interest analysis” approach, and the “most significant relationship” approach.<sup>74</sup>

### 1. Traditional Approach

The traditional approach to choice of law is memorialized in the First Restatement of Conflict of Laws.<sup>75</sup> The traditional approach is based on the idea that each forum’s laws are “territorially bounded”—that is, each state’s law applies only to events that occur within the borders of that state.<sup>76</sup> Although the traditional approach contains many rules for different scenarios, perhaps the most relevant here is the rule for torts. In a tort case, a court following the traditional approach will apply the law of the “place of wrong,” which is the place “where the last event necessary to make an actor liable for an alleged tort takes place.”<sup>77</sup>

*Alabama Great Southern Railroad Co. v. Carroll*<sup>78</sup> provides a useful example of this approach in practice. In *Carroll*, the plaintiff was an employee of the railroad company, an Alabama corporation.<sup>79</sup> The plaintiff, a citizen of Alabama, was employed under a contract made in Alabama and worked on a railroad extending from Alabama to Mississippi.<sup>80</sup> It was the duty of certain employees to check the strength of the links between the cars while the train was still in Alabama.<sup>81</sup> A particular link, however, left Alabama in a defective condition.<sup>82</sup> When the train entered Mississippi, the defective link broke and injured the plaintiff.<sup>83</sup> Under Mississippi law, an employer was not liable for damages caused by the negligence of an employee’s “fellow servant”; by contrast, Alabama had abrogated this fellow servant rule by statute.<sup>84</sup> As a result, the plaintiff could only recover from his employer if Alabama law applied. However, the court found that, because the injury occurred in Mississippi, applying the law of the place of wrong meant that Mississippi law must apply.<sup>85</sup>

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<sup>74</sup> See Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 583 (1996) (noting that three-fourths of states use either the traditional approach of the First Restatement of Conflicts or the most significant relationship approach of the Second Restatement).

<sup>75</sup> See generally RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

<sup>76</sup> KERMIT ROOSEVELT, CONFLICT OF LAWS 3 (2010).

<sup>77</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).

<sup>78</sup> 11 So. 803 (Ala. 1892).

<sup>79</sup> *Id.* at 803.

<sup>80</sup> *Id.* at 803-04.

<sup>81</sup> *Id.* at 804.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 805.

<sup>85</sup> *Id.* at 809.



As can be seen in *Carroll*, the traditional approach can be criticized because it sometimes leads to arbitrary results. Even though almost every contact in the case was with Alabama, the court was bound to apply Mississippi law under the theory that Alabama law had no force for wrongs occurring outside of its territory.

## 2. Interest Analysis Approach

Interest analysis developed in response to the problems with the traditional approach exemplified in *Carroll*. The basic idea behind interest analysis is that a court should only apply the law of a state when that state actually has an "interest" in the outcome of the dispute. If only one state has an interest in the outcome of a case, this is merely a "false conflict" between states' policies, and the law of the interested state should apply.<sup>86</sup> However, if both states are interested, or neither is interested, interest analysis deems the conflict unresolvable, and mandates the application of the forum's law.<sup>87</sup> Under this approach, a case like *Carroll* would likely be deemed a "false conflict." Since all of the parties were from Alabama, and the negligence occurred in Alabama, Mississippi would have little interest in applying its law to the dispute; therefore, Alabama law would apply under an interest analysis approach.

## 3. Most Significant Relationship Approach

A final approach to choice of law that is prevalent today is set forth in the Second Restatement of Conflict of Laws.<sup>88</sup> The Second Restatement "advises courts to apply the law of the state with 'the most significant relationship' to a particular issue."<sup>89</sup> The state with the most significant relationship is determined based on a multitude of factors, including the needs of the interstate system, the policies of the forum, the policies of other interested states, the expectations of the parties, the policies of the particular field of law, the predictability of the result, and the ease of applying the law.<sup>90</sup> These factors are then considered in light of other factors depending on the type of case at bar. For example, in a tort case, the Second Restatement advises a court to consider factors such as the place of

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<sup>86</sup> See ROOSEVELT, *supra* note 76, at 50 ("In [false conflict] cases, only one state is interested, and therefore applying its law advances its policies without harm to the policies of any other state.").

<sup>87</sup> See *id.* at 49 (recommending application of forum law in unprovided-for and true conflicts cases).

<sup>88</sup> See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

<sup>89</sup> ROOSEVELT, *supra* note 76, at 80.

<sup>90</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

injury, the place of conduct, the domicile of the parties, and the center of the relationship between the parties.<sup>91</sup>

Presumably, applying the Second Restatement approach in *Carroll*, the court would have chosen Alabama law. This result is almost certain because nearly every factor—including the policies of the forum, the predictability of the result, the relationship between the parties, the place of conduct, and the domicile of the parties—points toward Alabama law. As a result, a court would be hard pressed to find that Mississippi had the “most significant relationship” to the dispute.

## II. CONFLICTING APPROACHES TO CHOICE OF LAW IN FRAUDULENT JOINDER LITIGATION

It is not clear how a court should approach a fraudulent joinder analysis when faced with a choice of law issue. The law is not well settled on this point, and the few courts that have dealt with this issue have reached conflicting conclusions. This conflict arises because resolution of the fraudulent joinder question determines whether a federal court has subject matter jurisdiction. Some courts may be hesitant to make a choice of law determination without first establishing that subject matter jurisdiction exists. These conflicts implicate the policies behind diversity jurisdiction and the different approaches to choice of law.

The proper resolution of this issue is essential because the law applied to the case may determine whether or not a nondiverse defendant is considered fraudulently joined. The fraudulent joinder determination, in turn, determines whether the case will be heard in state or federal court—which will often affect whether the parties will litigate the case or settle. This Part reviews the approaches that courts have taken to the problem so far.

### A. Refusing to Engage in Choice of Law

Some courts have simply refused to make a choice of law determination when a case has been removed to federal court on the basis of fraudulent joinder, and the subject matter jurisdiction of the federal court has not yet been established. In *Abels v. State Farm Fire & Casualty Co.*, after a fire destroyed their home, the plaintiffs, citizens of California, filed suit in California state court against State Farm, a citizen of Illinois, and various “John Doe” State Farm employees, who were alleged to be citizens of

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<sup>91</sup> *Id.* § 145.

California.<sup>92</sup> State Farm removed the case to federal court on the grounds of diversity of citizenship.<sup>93</sup> State Farm then successfully moved to have the case transferred to the Western District of Pennsylvania.<sup>94</sup> The district court applied Pennsylvania law and found the plaintiffs' claims were time-barred.<sup>95</sup> On appeal, the plaintiffs argued that complete diversity was lacking and, therefore, the federal district court did not have subject matter jurisdiction; State Farm argued that the "John Doe" defendants had been fraudulently joined and should be ignored for the purposes of diversity.<sup>96</sup>

The Third Circuit determined that the plaintiffs' conduct was "consistent with an intention to actually proceed against at least some Doe defendants."<sup>97</sup> The court doubted whether the plaintiffs could maintain an action against insurance agents under California insurance law but could not say definitively that there was no "colorable" basis for the claims.<sup>98</sup> State Farm argued that, under Pennsylvania law, there was no cause of action available against insurance agents, and therefore there could be no colorable basis for the plaintiffs' claims against the Doe insurance agents.<sup>99</sup> The court declined to decide whether California or Pennsylvania law applied, explaining that "[a] federal court cannot engage in a choice of law analysis where diversity jurisdiction is not first established."<sup>100</sup> The court remanded the case, noting that the insurance agents could be dismissed later if State Farm proved that application of Pennsylvania law was correct in state court.<sup>101</sup>

The court in *Abels* prohibited a choice of law determination in the fraudulent joinder context, indicating that it was incapable of making a choice of law determination without first establishing its subject matter jurisdiction.<sup>102</sup> Since a fraudulent joinder inquiry may end with a disposition that diversity does not exist and the federal court does not have subject matter jurisdiction, the court concluded that engaging in a choice of law analysis was inappropriate.<sup>103</sup>

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<sup>92</sup> 770 F.2d 26, 27-29 (3d Cir. 1985).

<sup>93</sup> *Id.* at 28.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 28-29.

<sup>97</sup> *Id.* at 32.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 33 n.10.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 33.

<sup>102</sup> *Id.* at 33 n.10.

<sup>103</sup> *See id.*

*B. Reasonable Possibility Test*

Some courts will not engage in a full choice of law analysis, but rather will simply ask whether the plaintiff's suggested choice of law is "colorable"; if so, the court will remand. In *Morris v. Nuzzo*, Sampson, an Indiana citizen, killed his passenger Morris, also an Indiana citizen, while operating a vehicle in Indiana.<sup>104</sup> Morris's estate negotiated with Nuzzo, a claims adjuster for Sampson's insurance company and a citizen of Ohio, but failed to settle the claim.<sup>105</sup> Consequently, Morris's estate brought a wrongful death suit against Sampson and received a \$1.2 million verdict.<sup>106</sup> Sampson assigned his rights against his insurer to Morris's estate.<sup>107</sup> The estate subsequently filed suit against the insurance company and Nuzzo in Ohio state court, alleging breach of contract and bad faith failure to pay an insurance claim.<sup>108</sup> The insurance company and Nuzzo successfully removed the case to federal court; the estate moved to remand on the grounds that Nuzzo was a citizen of Ohio and could not remove under the "forum defendant rule."<sup>109</sup> The insurance company and Nuzzo argued that Nuzzo had been fraudulently joined in order to defeat federal jurisdiction.<sup>110</sup> The district court performed a choice of law analysis and determined that Indiana law should be applied because Indiana had the "most significant relationship" to the case.<sup>111</sup> And because Indiana law would prohibit recovery against Nuzzo, even though the claim would have been cognizable under Ohio law, the district court denied the estate's motion to remand.<sup>112</sup>

On appeal, the Seventh Circuit noted that "the fraudulent joinder analysis allows district courts to 'assume' limited jurisdiction over an otherwise nonremovable action to consider the viability of claims against an alleged fraudulently joined defendant."<sup>113</sup> The court explained that, to make the fraudulent joinder determination, "the district court must necessarily predict what substantive law the state court would apply. . . . [T]herefore,

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<sup>104</sup> 718 F.3d 660, 663 (7th Cir. 2013).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*; see also 28 U.S.C. § 1441(b)(2) (2012) ("A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

<sup>110</sup> *Morris*, 718 F.3d at 663-64.

<sup>111</sup> *Id.* at 664.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 671.

the district court must engage in some type of choice of law decision.”<sup>114</sup> The court held that “choice of law decisions can be made as part of the fraudulent joinder analysis where the choice of law decision is dispositive to the outcome, and where the removing defendant bears the same ‘heavy burden’ to make the choice of law showing” as it bears to make the fraudulent joinder showing.<sup>115</sup> The court further elaborated:

A choice of law decision is dispositive to the fraudulent joinder analysis when the plaintiff and the removing defendant disagree over the substantive law that should govern the claim against the alleged fraudulently joined defendant, and where the district court determines that the claim stands a reasonable possibility of success under the plaintiff’s suggested choice of law but not under the removing defendant’s. In that case, the removing defendant can demonstrate fraudulent joinder only by showing that, after resolving all issues of fact and law in favor of the plaintiff, there is no reasonable possibility that the state court would apply the plaintiff’s suggested choice of law.<sup>116</sup>

The court of appeals held that the district court erred in deciding the choice of law question directly, rather than applying the “reasonable possibility” standard of the fraudulent joinder analysis to the choice of law determination.<sup>117</sup> The court held that, in this context, it should be very difficult for the defendant to prove his choice of law: if “the plaintiff could satisfy even one applicable choice of law factor [in the most significant relationship analysis], [the federal court] should end the analysis there and remand the case.”<sup>118</sup> The court decided that because there was at least a reasonable possibility that a state court would have applied Ohio law, Nuzzo was not fraudulently joined and the case should have been remanded.<sup>119</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 672.

<sup>116</sup> *Id.* The *Morris* court considered this reasonable possibility approach to be consistent with the approach of the Third Circuit in *Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26 (3d Cir. 1985). *Morris*, 718 F.3d at 672 n.7; see also *supra* Section II.A. Although the *Abels* court refused to engage in a choice of law, the *Morris* court interpreted the *Abels* opinion as having first found a reasonable possibility that the plaintiff’s suggested choice of law would apply. *Id.* However, it is difficult to read the *Abels* and *Morris* opinions as articulating identical approaches. The *Abels* court merely stated in a footnote that there was a colorable basis for plaintiff’s suggested choice of law and indicated that, were there no such basis, the result “might be different.” 770 F.2d at 33 n.10. Unlike the *Morris* court, the *Abels* court did not indicate if or how it would actually undertake the choice of law analysis.

<sup>117</sup> *Morris*, 718 F.3d at 672.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 674.

### C. Resolving Ambiguity in Favor of Plaintiff's Choice of Law

Rather than engage in a choice of law analysis, some courts have simply declared that a disputed choice of law issue is ambiguous and should therefore be resolved in favor of the plaintiff's choice of law. In *Bellorin v. Bridgestone/Firestone, Inc.*, the plaintiffs, Mexican and Venezuelan citizens, brought suit under Texas law in Texas state court against Firestone, Bridgestone, Ford Motor Company, Smithers Transportation Test Centers, and Del Rio Test Centers.<sup>120</sup> The defendants removed to federal court, where the plaintiffs argued that since they were citizens of Mexico and Venezuela and Bridgestone was a Japanese corporation, foreign parties were on both sides of the controversy and no diversity existed.<sup>121</sup> Additionally, plaintiffs argued that because Smithers and Del Rio were Texas citizens, the defendants were prohibited from removing by the forum-defendant rule.<sup>122</sup> The defendants countered that Bridgestone, Smithers, and Del Rio were fraudulently joined.<sup>123</sup> They argued that Mexican or Venezuelan law applied to the dispute and neither of those laws provided a cause of action against Bridgestone, Firestone, Del Rio, or Smithers.<sup>124</sup>

The court determined that, while the defendants may eventually prove that Mexican or Venezuelan law should apply, the choice of law question was too uncertain at that stage of the litigation.<sup>125</sup> Rather than engaging in a choice of law analysis, the court resolved the ambiguity in favor of the plaintiffs' choice of law and remanded the case for lack of subject matter jurisdiction.<sup>126</sup>

### D. Applying Forum Law

Some courts have similarly avoided a full choice of law analysis by applying the forum's law to the fraudulent joinder determination and reasoning that they do not yet have jurisdiction to conduct a choice of law inquiry. In *Balberdi v. Lewis*, the plaintiff filed suit in Hawaii state court against FedEx and two nondiverse individual defendants.<sup>127</sup> FedEx removed to federal court on the basis that the nondiverse individual defendants were

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<sup>120</sup> 236 F. Supp. 2d 670, 675 (W.D. Tex. 2001).

<sup>121</sup> *Id.* at 676.

<sup>122</sup> *Id.* at 677.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 685.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> No. 12-00582, 2013 WL 1296286, at \*1 (D. Haw. Mar. 8, 2013), *adopted by* 2013 WL 1291780 (D. Haw. Mar. 27, 2013).

fraudulently joined.<sup>128</sup> The district court determined that whether the plaintiff had stated a claim against the individual defendants depended on whether Pennsylvania or Hawaii law applied to the allegations.<sup>129</sup> However, the court stated that it could not engage in a choice of law analysis where diversity jurisdiction had not yet been established.<sup>130</sup> Therefore, since the action was commenced in Hawaii, the court applied the forum's own law to determine the fraudulent joinder question.<sup>131</sup> Applying Hawaii law, the court found no fraudulent joinder and remanded the case.<sup>132</sup>

*E. Conducting a Choice of Law Inquiry Prior to the  
Fraudulent Joinder Analysis*

Many courts decide the choice of law issue before even reaching the fraudulent joinder question.<sup>133</sup> In *Asperger v. Shop Vac Corp.*, the plaintiff brought suit against Shop Vac, a product manufacturer, and Sears, a retailer, in Illinois state court after he was injured using a Shop Vac.<sup>134</sup> Because the plaintiff and Sears were both citizens of Illinois, the presence of Sears in the lawsuit defeated diversity.<sup>135</sup> Shop Vac removed on the basis that Sears had been fraudulently joined.<sup>136</sup> It was initially unclear whether Illinois or Delaware law applied to the dispute, so the court applied the "most significant relationship" choice of law rule and determined that Illinois law governed the dispute.<sup>137</sup> The court then applied Illinois law and determined that the plaintiff had a reasonable basis for recovery against Sears; therefore, Sears had not been fraudulently joined, and the case was remanded.<sup>138</sup>

The variety of approaches courts take to choice of law in fraudulent joinder litigation leads to inconsistent results. This uncertainty suggests that a uniform approach to these cases would be valuable.

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<sup>128</sup> *Id.* at \*1-2.

<sup>129</sup> *Id.* at \*3.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at \*3, \*5.

<sup>133</sup> See, e.g., *Collins v. Flynn*, No. 08-59, 2008 WL 3851842, at \*3-5 (W.D.N.Y. Aug. 15, 2008) (determining Massachusetts law applied before finding that the defendant was fraudulently joined under Massachusetts standards); *Boydston Metal Works, Inc. v. Parametric Tech. Corp.*, No. 99-480, 1999 WL 476265, at \*5-6 (D. Or. May 19, 1999) (deciding that Oregon law applied to the dispute, then using Oregon case law to resolve the fraudulent joinder question).

<sup>134</sup> 524 F. Supp. 2d 1088, 1091 (S.D. Ill. 2007).

<sup>135</sup> *Id.* at 1092.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1093.

<sup>138</sup> *Id.* at 1096-97.

### III. APPLYING FRAUDULENT JOINDER RULES TO THE CHOICE OF LAW ANALYSIS

Many of these approaches to choice of law in the fraudulent joinder context are flawed. When a court is faced with a choice of law problem in fraudulent joinder litigation, it must perform a choice of law inquiry—the issue cannot be avoided for the sake of convenience. The court should perform the choice of law analysis using the same standard as the relevant jurisdiction’s fraudulent joinder rule. For example, a jurisdiction may require a removing defendant to show that there is “absolutely no possibility” that the plaintiff can recover against the nondiverse defendant. In that case, the defendant must also show that there is “absolutely no possibility” that the plaintiff’s choice of law will apply to the case. This approach is faithful to the “heavy burden” placed on the removing defendant and the general presumption against removal.<sup>139</sup>

#### A. *Refusing to Make a Choice of Law Determination*

Courts cannot simply refuse to engage in a choice of law analysis in fraudulent joinder cases. A court cannot properly assess whether a party has been fraudulently joined without deciding which law should apply to that determination. The plaintiff’s ability to state a claim against the nondiverse defendant is entirely dependent “on the existence of supporting law.”<sup>140</sup> If there is no law that arguably applies to the plaintiff’s claim against the nondiverse defendant, then the plaintiff has failed to state a claim against that defendant and the case should remain in federal court.<sup>141</sup>

#### B. *Assuming Forum Law*

Similarly, courts that simply assume forum law applies to the fraudulent joinder determination are fundamentally mischaracterizing choice of law. This approach rests on the mistaken assumption that choice of law is merely a matter of procedure to which the court is free to apply its own law. In reality, choice of law is undoubtedly substantive: choice of law rules are

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<sup>139</sup> See *Balberdi v. Lewis*, No. 12-00582, 2013 WL 1296286, at \*2 (D. Haw. Mar. 8, 2013) (noting the strong presumption against removal and against a finding of fraudulent joinder), *adopted by* 2013 WL 1291780 (D. Haw. Mar. 27, 2013).

<sup>140</sup> Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1305 (1989).

<sup>141</sup> See *id.* at 1306-07 (arguing that if a plaintiff has failed to show that some law applies to the dispute, the plaintiff has failed to establish a right to relief).



what we use to “define substantive rights” of the parties.<sup>142</sup> As Professor Kramer explains: “[C]hoice of law is not a matter of procedure. It is, in fact, as substantive as it gets.”<sup>143</sup> A court making a choice of law determination “is deciding what the parties’ rights are in the litigation.”<sup>144</sup> Choice of law is what we use to “defin[e] the elements of a claim or defense.”<sup>145</sup> Therefore, a court that simply applies forum law to the fraudulent joinder inquiry bases its fraudulent joinder determination on the elements of a claim as defined by a law that may not even apply to the dispute. The importance of treating choice of law as substantive is especially pronounced in the fraudulent joinder context, because fraudulent joinder itself “involves a more substantive look at the claims the diversity-destroying party presents.”<sup>146</sup>

### C. *Assuming the Plaintiff’s Choice of Law*

While it is true that fraudulent joinder places a “heavy burden” on the removing defendant,<sup>147</sup> a court should not simply assume the plaintiff’s choice of law. The defendant must also have the chance, under the same heavy burden, to prove its choice of law. A simple acceptance of the plaintiff’s choice of law would have the effect of allowing a plaintiff to defeat the defendant’s right to removal at will. A plaintiff could select any law, regardless of its relationship to the dispute, and plead that law if it allowed the plaintiff to state a cause of action against the diversity-destroying defendant. This approach allows the plaintiff to manipulate the choice of law determination. Because forum selection is increasingly important to both parties,<sup>148</sup> the defendant must be afforded the opportunity to prove its choice of law and fraudulent joinder.

### D. *Making a Choice of Law Prior to the Fraudulent Joinder Determination*

A court that engages in a choice of law analysis, selects a law, and then conducts the fraudulent joinder inquiry takes the important step of making a choice of law determination. However, this strategy is also improper

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<sup>142</sup> Kramer, *supra* note 74, at 549.

<sup>143</sup> *Id.* at 569.

<sup>144</sup> *Id.* at 570.

<sup>145</sup> *Id.*

<sup>146</sup> Monahan, *supra* note 7, at 1349.

<sup>147</sup> See *Collins v. Flynn*, No. 08-59, 2008 WL 3851842, at \*3 (W.D.N.Y. Aug. 15, 2008) (“The defendant bears the heavy burden of proving [fraudulent joinder] by clear and convincing evidence, with all factual and legal ambiguities resolved in favor of plaintiff.”).

<sup>148</sup> See *supra* Section I.A.

because it mistakenly treats choice of law as if it is “something distinct from, and antecedent to, the process of ‘applying’ a law to decide the merits.”<sup>149</sup> If there is no colorable law to apply to the plaintiff’s claim against the nondiverse defendant, there can be, by definition, no merit in the claim against that defendant. The choice of law question, therefore, cannot be decided independently of the merits of the case, yet the approach taken by these courts depends on the idea that the merits and choice of law questions are distinct.

Further, in fraudulent joinder litigation, a court cannot approach a choice of law analysis in the same way that it would if subject matter jurisdiction had already been established—the court does not yet have this right.<sup>150</sup> Performing an independent choice of law inquiry prior to reaching the fraudulent joinder question allows the defendant to have a full hearing on the choice of law issue, which is inappropriate at that stage of the litigation. This approach is subject to manipulation because the removing defendant can have his choice of law established in the case merely by raising a fraudulent joinder claim.

This method also fails to give proper deference to the plaintiff’s choice of forum. A plaintiff should have meaningful control over choice of forum. The “heavy burden” placed on the removing defendant to show fraudulent joinder is based on a respect for the plaintiff’s choice of forum and on the concept that the plaintiff is the master of the complaint. Engaging in a choice of law analysis prior to the fraudulent joinder inquiry, without ensuring that the party has met the “heavy burden” placed on a showing of fraudulent joinder, fails to recognize these principles. Rather than placing the appropriate burden on the removing defendant, this approach wrongfully empowers the defendant to challenge the plaintiff’s choice of law.

#### E. *Applying Fraudulent Joinder Burdens to the Choice of Law Determination*

The same standards that apply to the fraudulent joinder question should apply to the choice of law question. The choice of law inquiry must be consistent with the fraudulent joinder burden. Therefore, “choice of law decisions can be made as part of the fraudulent joinder analysis . . . where the removing defendant bears the same ‘heavy burden’ to make the choice of

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<sup>149</sup> Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT’L L.J. 245, 257 (1991).

<sup>150</sup> See *Morris v. Nuzzo*, 718 F.3d 660, 672 (7th Cir. 2013) (finding that the district court was correct in making a choice of law determination but erred in treating that choice of law question as if it were deciding it directly).

law showing” as to make the fraudulent joinder showing.<sup>151</sup> Thus, a court should look to the applicable fraudulent joinder standard in the jurisdiction (e.g., “no reasonable possibility,” “absolutely no possibility”) and apply that same standard to the plaintiff’s choice of law. In other words, to prove fraudulent joinder, the diverse defendant must show that there is, for example, “absolutely no possibility” that the plaintiff’s choice of law applies. Applying the relevant fraudulent joinder burden to the choice of law inquiry gives the defendant the opportunity to make a showing of his choice of law to support his fraudulent joinder allegation without giving him the opportunity to have a premature full hearing on the issue.

This approach is faithful to the idea that choice of law is a question concerning the merits of the case, rather than “a distinct threshold question that must be resolved before the court can render a decision on the merits.”<sup>152</sup> A decision can be rendered on the merits of the claim against the alleged fraudulently joined defendant only with reference to a particular state’s law. Answering the choice of law question often requires resolving disputed issues of fact and identifying the interests involved in a particular case—determinations which are inherently intertwined with the merits. Applying the unique burdens of the fraudulent joinder structure to the choice of law determination upholds this understanding of choice of law as a merits question and gives proper deference to the plaintiff’s choice of forum.

### CONCLUSION

A choice of law determination must be made in the context of fraudulent joinder litigation. However, that determination is not a freestanding inquiry but rather an inquiry that must be made with reference to a jurisdiction’s particular fraudulent joinder standard. Federal courts should apply the same burden to the choice of law determination that they apply to the fraudulent joinder showing. A court that applies a “no reasonable possibility” standard to a finding of fraudulent joinder, for example, should apply that same “no reasonable possibility” standard to the choice of law determination. Unlike many existing approaches, this approach recognizes that, in a fraudulent joinder case, the federal court has not yet established its subject matter jurisdiction. Therefore, the choice of law inquiry must be modified as determined by the jurisdiction’s fraudulent joinder rules.

Just as a choice of law analysis undoubtedly involves the merits of a given case, so too does the fraudulent joinder inquiry. “A decision about fraudulent

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<sup>151</sup> *Id.*

<sup>152</sup> Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 306 (1990).

joinder *is* a decision about merits; it is a decision about the merits of the case against the non-diverse defendants.”<sup>153</sup> Fraudulent joinder litigation offers federal courts a unique opportunity to delve into the merits of a case, including the case’s choice of law issues, even prior to establishing subject matter jurisdiction.

Understanding the appropriate method for choice of law analysis in the fraudulent joinder context ensures that cases are litigated in the proper forums. Fraudulent joinder is ultimately a dispute between two sides arguing to have their case heard in the most favorable forum. Since forum selection is one of the most important and determinative aspects of a given case, and proper resolution of the choice of law issue can be dispositive to the forum determination, a uniform approach is necessary. The suggested approach for choice of law in fraudulent joinder cases offers an equitable solution to the problem without unfairly constraining plaintiffs’ choice of forum or defendants’ statutory right to removal.

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<sup>153</sup> *In re New Eng. Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d 288, 304 (D. Mass. 2004).